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COUNTERSTATEMENT OF QUESTIONS PRESENTED.

1. After commencement of the reorganization proceedings of the Penn Central Transportation Company (Penn Central) under Section 77 of the Bankruptcy Act, did the Reorganization Court have summary jurisdiction to enjoin Bethlehem Steel Corporation (Bethlehem) from setting off, against freight charges admittedly due Penn Central, Bethlehem's pre-reorganization claims for material supplied?

2. Was Bethlehem prohibited by the Interstate Commerce Act from effecting a non-judicial set-off against freight charges admittedly due Penn Central for Bethlehem's pre-reorganization claims for material supplied?

COUNTERSTATEMENT OF THE CASE.

The instant matter arises out of the affirmance by the United States Court of Appeals for the Third Circuit (Court of Appeals) of Order No. 571 of the United States District Court for the Eastern District of Pennsylvania (Reorganization Court) in the reorganization proceedings of the Penn Central Transportation Company, Debtor (Penn Central). Order No. 571 enjoins certain customers (shippers) of Penn Central, including Bethlehem Steel Corporation (Bethlehem), from setting off or attempting to set off, against freight charges due Penn Central, the shippers' *pre*-reorganization claims against Penn Central.

The petition for reorganization (3a-4a) [1] commencing the proceedings below was filed on behalf of Penn Central on June 21, 1970. On that same day, the Honorable C. William Kraft entered, *ex parte,* Order No. 1 (5a-17a), approving the petition for reorganization and providing in pertinent part as follows (14a):

> "10. All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them hereby are restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from off-setting the same, or any thereof, against any obligation of the debtor, until further order of this Court."

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1. References to pages followed by the letter "a" are to the printed Appendix filed in the Court of Appeals, a copy of which has been certified to this Court. References to pages preceded by the letter "A" are to the appendices to Bethlehem's Petition for a Writ of Certiorari.

Subsequent to the entry of Order No. 1, a limited number of shippers refused or failed to pay Penn Central outstanding charges for freight or other services in the total amount of approximately $9 million, principally for services rendered prior to June 21, 1970. These refusals to pay were based upon attempts by the shippers to set off against the freight charges amounts allegedly due the shippers from Penn Central on account of claims for freight loss and damage, overcharges and salvage and on account of material or services supplied to Penn Central, all arising prior to June 21, 1970.[2] The shippers continued to assert the attempted set-offs after they were advised that they were not entitled to do so under Order No. 1, and on October 14, 1970 the Trustees of the property of Penn Central (Trustees) petitioned the Reorganization Court for an order directing the shippers, including Bethlehem, to pay all amounts due Penn Central without offset or reduction (19a-41a). This petition was scheduled for hearing on November 30, 1970 (18a).

A total of approximately 260 shippers were listed in the petition (22a-41a, 141a). Prior to the hearing, it was determined that approximately 60 of the named shippers had remitted payment to Penn Central, either before or after the filing of the petition, leaving a balance due of approximately $7.5 million (99a-100a, 103a-104a). Of the remaining shippers, a few filed motions or answers questioning the Reorganization Court's jurisdiction to enjoin set-offs against, and to compel payment of, charges for freight or other services. A number of others filed answers or appeared at the hearing, submitting to the Court's jurisdiction, but asserting the right of set-off as to the amounts due Penn Central (141a-157a). The vast majority of shippers did not contest the petition in any manner.

2. Claims in these categories arising subsequent to June 21, 1970 are being paid on a current basis.

Bethlehem had originally filed an answer (42a-43a), averring set-offs effected prior to June 21, 1970 [3] against freight charges due Penn Central on account of sums allegedly due Bethlehem for material supplied. Bethlehem subsequently, on the day of the hearing, filed an amended answer (286a), supported by an affidavit (287a-293a), denying the Reorganization Court's jurisdiction. The affidavit expressly detailed the manner in which Bethlehem had asserted its set-offs, in the approximate amount of $3.4 million, with regard to the freight charges admitted due Penn Central. Although Bethlehem's affidavit averred that the entire amount had been set off prior to June 21, 1970, this was contradicted by the affidavit of Richard E. Semerad (98a-135a), filed in support of the Trustees' petition, which indicates that Bethlehem's attempted set-offs had only reached the amount of $662,870.71 (not $3.4 million) by June 21, 1970 (191a).

At the hearing on November 30, 1970, there was no attempt to dispute the amounts, as set forth in the Semerad affidavit, claimed to be due Penn Central by each of the shippers. Rather, the shippers directed their attention solely to the legal arguments in support of their contentions that the Reorganization Court had no summary jurisdiction to compel the payment of the amounts due Penn Central (158a-162a, 191a-193a), or should affirm the right of the shippers to make such payment in the form of the alleged set-offs (162a-196a). The Trustees, therefore, requested the Reorganization Court only to make a determination that the shippers were not entitled to withhold payment on account of the alleged set-offs, and to defer the entry of a judgment so that further procedures thereafter

3. Despite the assumption of the Court of Appeals to the contrary, Bethlehem was the only shipper which alleged in the Reorganization Court that it had effected its set-off against freight charges prior to the commencement of the reorganization proceedings on June 21, 1970.

could be taken directly with each of the shippers to verify, and hopefully agree upon, the exact amounts due (143a-145a).

The Reorganization Court held the matter under advisement pending determination by the Court of Appeals of the basic similar issue raised by the appeals in *In re Penn Central Transportation Co., Appeal of First Wisconsin National Bank, et al.*, 453 F. 2d 520 (1971), *cert. denied*, 408 U. S. 923 (1972) (*Bank Set-Off* case), which were decided on December 23, 1971. In that case, the Court of Appeals affirmed the summary jurisdiction of the Reorganization Court over property of Penn Central, including choses in action such as deposit accounts, where there was no bona fide disputes with respect to Penn Central rights thereto. The *Bank Set-Off* decision further upheld the power of the Reorganization Court, in the exercise of its summary jurisdiction, to enjoin creditors of Penn Central from securing preferential payment by setting off their claims against amounts due Penn Central. On January 31, 1972, the Reorganization Court, on the basis of the Court of Appeals' opinion in the *Bank Set-Off* case, entered an opinion (A1-A9) and Order No. 571 (A10), holding (1) that it had summary jurisdiction to control the exercise of the set-off rights asserted by the shippers against freight charges due Penn Central [4] and (2) denying

4. The Reorganization Court held that it did not have summary jurisdiction in those instances where the shippers' set-offs (a) were based upon claims to recover pre-reorganization freight overcharges and salvage proceeds, or (b) were effected prior to June 21, 1970 against claims by Penn Central for other than freight charges. The reasoning behind these aspects of the Reorganization Court's decision was that claims to recover freight overcharges and salvage proceeds involved sums actually received by Penn Central which could be considered as payments on account of the freight charges due Penn Central, and that pre-reorganization set-offs against Penn Central's claims other than for freight charges were permissible. In both events, the Reorganization Court concluded, there was a sufficient bona fide dispute as to Penn Central's rights to recover its charges to defeat the Court's summary jurisdiction.

that right insofar as the set-offs were based upon claims for freight loss and damage or for material or services supplied arising prior to June 21, 1970.[5]

This ruling was clear as to the majority of the shipper set-offs which, as was the situation in the *Bank Set-Off* case, were not attempted until *after* the commencement of the reorganization proceedings, even though the claims on which they were based arose prior to reorganization. Since there was no bona fide dispute prior to reorganization as to Penn Central's freight charges, the Reorganization Court had summary jurisdiction on June 21, 1970 to enjoin the set-offs and to compel payment of the amounts due Penn Central. The Reorganization Court further determined that there was no substantial dispute concerning Penn Central's claims for freight charges even as to those shippers, principally Bethlehem, which allegedly effected a set-off prior to reorganization for materials previously supplied, on the ground that non-judicial set-offs against freight charges were prohibited by the Interstate Commerce Act (A2-A4).

Because of the interval between the hearing on November 30, 1970 and the entry of Order No. 571 on January 31, 1972 (resulting from the pendency of the *Bank Set-Off* case in the Court of Appeals), and the staleness of the record with regard to the amounts due Penn Central and the bases for the alleged set-offs, the Reorganization Court *did not enter any monetary judgment or order compelling*

5. In disallowing those set-offs over which it has jurisdiction, the Reorganization Court expressed particular concern that a contrary result would discriminate against the vast majority of shippers who had paid freight charges in full, and would jeopardize the operating revenues of Penn Central (A7). Bethlehem apparently does not question the discretion of the Reorganization Court to disallow set-offs over which it has jurisdiction where consistent with the purposes of reorganization. *Lowden v. Northwestern Nat'l Bank & Trust Co.*, 298 U. S. 160 (1936); *Susquehanna Chemical Corp. v. Producers Bank & Trust Co.*, 174 F. 2d 783 (3d Cir. 1949).

payment by the shippers. Rather, the Court enjoined the shippers in general from setting off pre-reorganization claims against freight charges due Penn Central, permitting such claims to be filed as part of the proof of claim procedure instituted under Order No. 164 of the Reorganization Court. *The grant of specific relief to the Trustees was deferred so that the record could be supplemented in accordance with the guide lines expressed in the Court's opinion.*

Appeals were taken from Order No. 571 by *only seven* of the approximately 200 shippers who were subject thereto, including Bethlehem, which appeals were consolidated for briefing and argument in the Court of Appeals. On April 27, 1973, the Court of Appeals handed down its opinion (A11-A16) upholding the Reorganization Court's jurisdiction to enjoin the attempted set-offs against freight charges due Penn Central. Since the decision in the *Bank Set-Off* case clearly denied set-offs attempted after the commencement of the reorganization proceedings and the entry of Order No. 1, the Court of Appeals limited its opinion in this shippers' appeals to the issues raised principally by Bethlehem as to whether its alleged set-off against the freight charges prior to June 21, 1970 created a bona fide dispute as to Penn Central's rights thereto. In this respect, the Court of Appeals agreed with the Reorganization Court that the Interstate Commerce Act requires the payment of freight charges by cash or check and prohibits payment by nonjudicial set-off for materials supplied (A13).

The Court of Appeals recognized, as did the Reorganization Court, that this Court had permitted shippers, as an exception to the cash payment rule, to assert judicial set-offs in the form of counterclaims for freight loss and damage against a rail carrier not in reorganization in suits

instituted to collect freight charges. The Court concluded, however, as it had in the *Bank Set-Off* case, that different considerations governed once a rail carrier instituted reorganization proceedings, and held that any set-off not enforced by way of counterclaim prior to reorganization should not be allowed when a rail carrier in reorganization seeks enforcement of its claim in the reorganization proceedings.

REASONS FOR DENYING THE WRIT.

A. The Decisions of the Reorganization Court and the Court of Appeals Are Consistent With Other Recent Railroad Reorganization Set-Off Decisions.

Bethlehem does not dispute herein the summary jurisdiction of the Reorganization Court to enforce Penn Central's claims for freight charges and to enjoin post-reorganization set-offs by shippers against such claims, in instances where no set off had been effected prior to the commencement of the Penn Central reorganization proceedings. *It is conceded that under those circumstances there is no substantial adverse dispute to Penn Central's rights as to the freight charges, permitting the exercise of the Reorganization Court's summary jurisdiction.* This power to vindicate the claims of a railroad in reorganization in the absence of a bona fide dispute with respect thereto has been upheld by the Court of Appeals in the *Bank Set-Off* case and in *In re Central R. R. Co. of N. J.*, 273 F. Supp. 282 (D. N. J.), *aff'd*, 392 F. 2d 589 (3d Cir. 1967), as well as by the Court of Appeals for the Second Circuit in *In re Lehigh and Hudson River Ry.*, 468 F. 2d 430 (1972).

The sole reason assigned by Bethlehem in support of its Petition for Certiorari is that both the Reorganization Court and the Court of Appeals ignored the fact that Bethlehem, unlike the remaining shippers, had effected its set-off against Penn Central's freight charges prior to June 21, 1970, thereby establishing a substantial bona fide dispute as to Penn Central's rights thereto. It is Bethlehem's contention that the exercise by the Reorganization Court of summary jurisdiction over Penn Central's claim for freight charges owed by Bethlehem, despite Bethlehem's

pre-reorganization set-off, directly conflicts with the Reorganization Court's prior decision in the *Bank Set-Off* case with respect to the National City Bank of Cleveland, *In re Penn Central Transportation Co.*, 315 F. Supp. 1281 (1970), *aff'd*, 453 F. 2d 520 (3d Cir. 1971), *cert. denied*, 408 U. S. 923 (1972), and the decision of the Court of Appeals for the Second Circuit in *In re Lehigh and Hudson River Ry.*

In the *Bank Set-Off* case, the Reorganization Court held that it did not have summary jurisdiction to compel the reinstatement of sums credited to Penn Central's account with the National City Bank of Cleveland where the bank had alleged it had effected its set-off against Penn Central's deposit account on Saturday, June 20, 1970, prior to the commencement of the reorganization proceedings. Similarly, the Court of Appeals for the Second Circuit in *In re Lehigh and Hudson River Ry.*, although recognizing the summary jurisdiction of a railroad reorganization court over the railroad's claims generally, decided that the allegation of a pre-reorganization set-off by a carrier, in that case by Penn Central, against interline balances owed to another carrier in reorganization provided a substantial adverse claim to the amounts allegedly due the carrier for interline balances, the validity of which could be determined only in a plenary action.

Neither the Reorganization Court nor the Court of Appeals ". . . ignored or blurred consideration of the critical time factor" as asserted by Bethlehem. On the contrary, the Court of Appeals, at the beginning of its opinion, addressed itself to the very issue raised by Bethlehem concerning the unique timing of its set-off, i.e., ". . . whether a reorganization court in a Chapter 77 proceeding has summary jurisdiction to enjoin a nonjudical set off . . . effected prior to the Debtor's filing

for reorganization." It is Bethlehem, not the courts below, which has deliberately ignored, or refused to acknowledge, the distinction between the alleged pre-reorganization set-offs by the National City Bank of Cleveland in the *Bank Set-Off* case and by Penn Central in *In re Lehigh and Hudson River Ry.*, both of which were arguably permissible,[6] and Bethlehem's alleged set-off.

Both the Reorganization Court and the Court of Appeals expressly held that the Interstate Commerce Act prohibited payment of freight charges by means of non-judicial set-offs. As a consequence, Bethlehem's alleged pre-reorganization set-off of its claims for material supplied, being legally ineffective, was not sufficient to constitute a substantial adverse claim to the sums due Penn Central on account of freight charges. Thus it did not defeat the Reorganization Court's summary jurisdiction to compel payment of these charges.

This determination as to the invalidity of Bethlehem's alleged set-off distinguishes Bethlehem's situation from that of the National City Bank of Cleveland in the *Bank Set-Off* case and of Penn Central in *In re Lehigh and Hudson River Ry.* Rather, Bethlehem stood in the same position at the commencement of the Penn Central reorganization proceedings, *vis-a-vis* Penn Central's claims, as did the banks, and other shippers having claims against Penn Central, which had not attempted pre-reorganization set-offs. It follows that the affirmance by the Court of Appeals of the exercise of summary jurisdiction over Penn Central's claim for freight charges against Bethlehem is con-

6. The one bank's action in setting off prior to reorganization was not obviously unlawful on its face. Nor is there any provision in the Interstate Commerce Act requiring payment of amounts owed among railroads in cash or barring them from settling interline balances through a system of "set-offs," *i.e.*, by the netting of credits and debits and the payment of only the balance.

sistent with the *Bank Set-Off* and *Lehigh and Hudson River Ry.* cases, and there is no reason for this Court to review the decision on the basis of a conflict in decisions.

B. Bethlehem's Non-Judicial Set-Off Against Freight Charges Due Penn Central Was Prohibited by the Interstate Commerce Act.

The real thrust of Bethlehem's Petition for Certiorari lies not in an imagined conflict of decisions, but in Bethlehem's assertion that the Court of Appeals incorrectly interpreted the Interstate Commerce Act and this Court's opinion in *Chicago & N. W. Ry. v. Lindell*, 281 U. S. 14 (1930) in determining that Bethlehem's pre-reorganization non-judicial set-off against freight charges was invalid. Bethlehem's position in this respect cannot be sustained. On the contrary, the Court of Appeals correctly applied the law to the facts of Bethlehem's alleged set off and there is no need for further review by this Court.

The Interstate Commerce Act, in furtherance of the public policy against discriminatory practices, strictly regulates railroads in the collection of freight charges. In particular, Section 6(7) of the Interstate Commerce Act, 49 U. S. C. § 6(7), provides, *inter alia*, that no carrier shall:

> ". . . *charge or demand or collect or receive a greater or less or different compensation* for such transportation of passengers or property, or for any service in connection therewith . . .; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs." (Emphasis added.)

Under Section 6(7) as interpreted by this Court, freight charges must be paid only in cash or check, *Fullerton Lumber Co. v. Chicago M. St. P. & Pac. R. R.*, 282 U. S. 520 (1931), and not in exchange for release of damage claims, *Louisville & N. R. R. v. Mottley*, 219 U. S. 467 (1911), or material or services supplied, *Chicago, I & L. R. R. v. United States*, 219 U. S. 486 (1911). Moreover, payment must be made upon delivery, or if credit is warranted, within 120 hours after delivery. Interstate Commerce Act, § 3(2), 49 U. S. C. § 3(2); I. C. C. Order No. 73, 49 C. F. R. § 16(e).

In *Mottley*, this Court held that an agreement by a carrier to provide free passenger transportation in settlement of a personal injury claim, even though valid when made, was unenforceable after the enactment of Section 6(7) because it resulted in the railroad's collecting and receiving "different" compensation than that specified in the lawfully published tariffs, *i.e.*, money. Any other interpretation, it was concluded would make the word "different" in Section 6(7) superfluous or meaningless, a result which the Court would not attribute to the Congress, 219 U. S. at 475. In the course of its opinion, this Court stated (219 U. S. at 476-77):

> "But an examination of the [tariff] schedules would be of no avail and would not ordinarily be of any practical value if the published rates could be disregarded in special or particular cases by the acceptance of property of various kinds, and of such value as the parties immediately concerned chose to put upon it, in place of money for the services performed by the carrier.
>
> "That money only was receivable for transportation is the basis upon which the Interstate Commerce Com-

> mission has proceeded; for, in one of its Conference Rulings (207) issued in 1909, the Commission held that nothing but money could be lawfully received or accepted in payment for transportation, whether of passengers or property, for any service connected therewith, 'it being the opinion of the Commission that the prohibition against the charging or collecting a greater or less or *different* compensation than the established rates or fares in effect at the time precludes the acceptance of service, property or other payment in lieu of the amount specified in the published schedules.' It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the statute." (Emphasis in original.)

This Court has indicated further that an arrangement by a railroad to purchase land in exchange for freight charges was violative of the Interstate Commerce Act, even where the land was of much greater value than the amount of the freight charges. *Fourche R. R. v. Bryant Lumber Co.*, 230 U. S. 316 (1913). And, in *Northeast Airlines, Inc. v. C. A. B.*, 345 F. 2d 662 (1st Cir. 1965), an arrangement by which freight charges due an air freight carrier would be set off against an account owed to a shipper for equipment previously supplied to the carrier was held to be unlawful under a statutory provision similar to Section 6(7). The court was of the opinion that the contemplated offset for materials previously supplied against transportation charges ". . . was no less a barter transaction than would be an agreement by which [the carrier] bound itself to furnish transportation to a supplier of goods and services in return for a certain amount of the merchandise of the supplier." 345 F. 2d at 664.

A fortiori, the attempted set-off herein by Bethlehem of claims for material supplied against Penn Central's freight charges is likewise violative of the Interstate Commerce Act.

As an exception to the cash-only payment rule of *Mottley*, this Court has permitted a counterclaim for *freight damage claims only* to be asserted in a judicial proceeding instituted by a carrier to collect freight charges, so that the court may determine the issues with respect to both for obvious reasons of judicial economy. *Chicago & N. W. Ry. v. Lindell*, 281 U. S. 14 (1930). In such a situation, the facts and circumstances of each claim are available on a public record and subject to judicial scrutiny. This is true whether the counterclaim be in the form of a set-off to avoid liability or in the form of an affirmative demand for relief, and the Court of Appeals did not purport to limit *Lindell* to merely affirmative counterclaims.

On the other hand, the allowance of judicial counterclaims has never been extended to render valid private non-judicial set-offs, which are subject to all of the possibilities for rebate, preference, prejudice, or discrimination which the Interstate Commerce Act seeks to avoid. Rather, such arrangements fall within the general rule of *Mottley* requiring cash payment of freight charges.

Moreover, *there is no authority* (and Bethlehem cites none) *applying the judicial counterclaim exception to claims, such as Bethlehem's, for material and services supplied, unrelated to the freight service rendered by the carrier.* All of the decisions permitting counterclaims by shippers in actions by carriers for freight charges involve claims by the shipper for damages resulting from a breach of the particular transportation contract involved in the suit or related ones. To permit a shipper

to pay freight charges by releasing the carrier's obligations to the shipper for the purchase of materials such as steel, even by way of judicial counterclaim, would provide a procedure whereby the shipper pays its freight bill not with money but with materials, contrary to the teachings of this Court in *Mottley* and its progeny.

The determination by the Court of Appeals that Bethlehem's attempted pre-reorganization non-judicial set-off was invalid under the Interstate Commerce Act is thus in conformity with this Court's decisions and effectuates the Congressional policy against discrimination. As a result of that determination, the Court of Appeals was correct in further holding that there was no bona fide dispute as to Penn Central's freight charge claims against Bethlehem at the commencement of the reorganization proceeding and that the Reorganization Court therefore had summary jurisdiction to compel payment of these charges.

CONCLUSION.

For the above reasons, it is submitted that the decision of the Court of Appeals affirming the Reorganization Court's summary jurisdiction to compel payment of the freight charges due Penn Central by Bethlehem was correct and should not be reviewed by this Court. Bethlehem's Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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